Where water mains are laid by authority of a city, which supplies its inhabitants, and a consumer connects with the street main, paying for the laying of the same and water rents for two years and the water freezes in the main, because of its being left too near the surface of the ground, in consequence of which the connections burst and the tenants of said consumer leave, because they are unable to obtain water, it has been decided that such consumer could recover the water rents paid and no more: *Smith* v. *Philadelphia*, 81 Pa. St. 38.

The introduction of water by a city, into private houses, is not upon the footing of a contract, but of a license, which is paid for: *Tainter* v. *Worcester*, 123 Mass. 311.

The claim that gas is of poor quality, is no defence to an action to recover for gas supplied: *Great Central Gas Consumers' Co.* v. *Tallis*, 3 Gas. J. 5; *Torquay Gas Co.* v. *Carter*, 32 Gas. J. 5.

Mandamus is the proper remedy for compelling a supply of gas or water: *Price* v. *Riverside Land & I. Co.*, 56 Cal. 431; *Lumbard* v. *Stearns*, 4 Cush. 60; *The People* v. *Manhattan G. L. Co.*, 45 Barb. 137.

SALON D. WILSON.

Chicago, Ill.

RECENT ENGLISH CASE.

High Court of Justice, Chancery Division.

BROWN *v.* ALABASTER.

Where, during unity of possession, a particular and defined way is formed and used over property which is afterwards severed and granted by the owner to different persons, the right of using the way as it is then used may pass by implication, although it be not a way of necessity, and although the general words of the conveyance are not sufficient to pass such right.

An owner of land erected three houses thereon facing a road, with gardens at the back. Behind these ran a way which gave access from the gardens of two of the houses to a side road, which ran at right angles to the front road on the other side of the third house. The owner assigned to the defendant the plots of land with the two houses thereon, "with their rights, easements, and appurtenances," and afterwards assigned to the plaintiff the third plot, the dimensions of which comprised so much of the way as lay between the two other plots and the side road. The gardens of the defendant's houses could also be reached from the road in front by two passages, but these were unsuitable for carrying away rubbish, etc., from the gardens. The plaintiff disputed

the defendant's right to use the way over his land to the side road: *Held*, that the defendant was not entitled to this as a way of necessity, but that the right of using the way passed to him by implied grant from the owner, although the general words in the assignment to him were not sufficient to pass such right.

W. LETTS, being possessed for a term of years of a plot of land situate at the corner of Augusta-road and Park-road, at Moseley, in the parish of King's Norton, Worcestershire, erected thereon three houses facing on Park-road. One of these, called "Normanhurst," which belonged to the plaintiff, was situate at the angle formed by the two roads. The house next to it was called "Cottisbrook," and beyond it a third, called "Westbourne." Both these houses belonged to the defendant. The three plots of land on which the houses respectively stood, were in the shape of a long parallelogram, and each of the houses had a garden at the back. The main entrances to the houses were from Park-road, but both Cottisbrook and Westbourne had also entrances leading to the house from the road by a passage which ran along the side of each house, that to Cottisbrook running between it and Normanhurst, and that to Westbourne running along its further side. These passages ended in a *cul-de-sac*, and then turned inwards at right angles, passing through a portion of the buildings, and thus led into the gardens at the back. They were four feet wide, paved with encaustic tiles, and were approached from Park-road by one step, with two steps of descent into the gardens. They were closed with doors at each end, and, at their passage through the buildings, they had doors on the right and left hand, which communicated with the hall on the one side and with the offices on the other.

There was also another means of access to the gardens of Cottisbrook and Westbourne, as to which the action arose, being through a way which ran parallel to Park-road along the plot of land at the lower end of the gardens into Augusta-road. It was walled in, and had a door at the road, and also two doors in the wall which gave access to the gardens of Cottisbrook and Westbourne.

The assignments of these properties by Letts and his mortgagees to the defendant was dated the 14th of December, 1878, and the pieces of land were thereby expressed to be assigned

"together with the two messuages or dwelling-houses erected thereon, with their rights, easements, and appurtenances."

The plaintiff derived his title to Normanhurst under an indenture of the 13th day of November, 1879, by which Letts assigned that piece of land and the messuage thereon to the plaintiff's vendor. The parcels were therein described as those comprised in the original lease of that portion of the land to Letts, dated the 5th of October, 1877, in which the piece of land was described as being of a certain length on each side, and as containing so many square yards. These dimensions included so much of the site of the way behind the gardens as lay between Augusta-road and the opposite limit of the Normanhurst property. And the indenture of the 13th of November, 1879, contained no reservation by Letts of any right of way over the same. The way had been formed and existed in its present state prior to either of the above assignments by Letts, and had been used by the defendant since he acquired his two houses. The plaintiff disputed his right of using the way, and brought this action, claiming a declaration that the defendant was not entitled, as against him, to any right of way from or to his houses over or across his land to or from Augusta-road, and that he, his agents and servants, might be restrained from passing over or otherwise trespassing upon the plaintiff's land.

A surveyor and house agent, who was called on behalf of the plaintiff to prove a plan of the properties, said, in cross-examination, that in his opinion the passages to the gardens of Cottisbrook and Westbourne from Park-road were unsuitable for the carrying away of rubbish, etc., from the gardens, and that the use of the way at the back of the gardens was convenient for the occupiers of those two houses.

Methold, for the plaintiff.

Marten, Q. C., and *Horace Browne*, for the defendant.

KAY, J. (after stating the facts and describing the position of the properties).—The question is whether the indenture of the 14th of December, 1878, passes a right of way from the gardens of Cottisbrook and Westbourne through this passage into Augusta-road. When this assignment was made, this right of way was in no sense an easement. The question, therefore, is two-

fold, (1) was it a way of necessity, and (2) did it pass by implied grant under the assignment? As a way of necessity it would be difficult for the defendant to sustain the right, for a way of necessity is not a right of passing over a defined way, but is merely a direct means of access to a tenement, and it is clearly established that a grantor is entitled to elect what course such a way shall follow. There is no question of any election in this case, the right claimed is to pass over a particular road, which is enough to show that it is not a way of necessity. If it were such a way, then, whether formed or not, a way would have passed with the property. That is to say, if there had been no back doors, and access to the gardens had only been through the tiled passages, in such case if the owners of Cottisbrook and Westbourne were held to be entitled to a way of necessity to their gardens, then the owner of Westbourne would be entitled to a way over both Cottisbrook and Normanhurst, and the owner of Cottisbrook to a way over Normanhurst alone. It would be impossible to hold that having already a way to the road in front through the tiled passages, they were also entitled to a way in some direction or other from the gardens to the other road. I am therefore of opinion that this is not a way of necessity.

Then comes the question whether this right of way will pass, as a continuous and apparent easement, by implied grant. It is stated in Gale on Easements, that a right of way is not a continuous easement, but no authority is given for the statement. In *Hinchliffe* v. *The Earl of Kinnoul*, 5 Bing. N. C. 1, a lessee claimed a right of way over a passage on one side of his house which communicated with a coal-shoot and with certain pipes for conveying water and soil from the house. These formed part of the tenement, for TINDAL, C.J., in giving judgment, says, at p. 24: "We cannot, therefore, feel any doubt but that, under the description contained in the lease, the coal-shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself."

Now there was in that case another means of approaching the coal-shoot over the tenement, but the jury found that the passage was not merely convenient, but necessary, for the use of the coal-shoot, and there is this passage in the judgment, at p. 25: "Since, therefore, as it appears to us, the right in question passed

to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject-matter of the demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or might not pass to the lessees under the express words used in the lease itself as 'an appurtenant unto the said piece or parcel of ground, messuage, or tenement, erections, buildings, and premises, belonging, or appertaining.' There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is an appurtenant in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation." And after a reference to the authorities the judgment continues: "But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon this second point." That ground having been stated on p. 24 to be that "upon the facts found in the special verdict, such right did pass as a necessary incident to the subject-matter actually demised, although not specially named in the lease. The rule laid down in Plowden's Comm., 16a, is, "that by the grant of anything, *conceditur et id, sine quâ res ipsa haberi non potest.*"

Therefore, in that case the way was really a way of necessity. That decision has often since been commented on and followed.

In *Langley* v. *Hammond*, 16 W. R. 937; s. c. L. R. 3 Ex. 161, there was a grant of part of certain demised premises, "together with all ways, etc., therewith now used, occupied, and enjoyed," and Lord BRAMWELL, in giving judgment, said: "Suppose a house to stand one hundred yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these;" that is, the words "used, occupied, and enjoyed with," which were the words relied on in the case of *James* v. *Plant*, 4 Ad. & El. 749; s. c. 5 B. & Ad. 791. In the later case of

Watts v. *Kelson*, 19 W. R. 338; s. c. L. R. 6 Ch. at p. 174, MELLISH, L. J., said: "We may also observe that in *Langley* v. *Hammond*, BRAMWELL, B., expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." This is a mistake, for the words in *Langley* v. *Hammond* were not ordinary, but extraordinary, as they were in *James* v. *Plant*.

In *Pearson* v. *Spencer*, 11 W. R. 471; s. c. 3 B. & S. 762, where the owner of a farm had divided it by his will into two portions, and one portion was landlocked, so that it was necessary to pass over the other portion to reach it, and the devisor had, during his life, used a way in a certain direction over that portion, the right to use this way was held to pass by the devise of the landlocked portion. This was distinctly an advance in the doctrine, for it was held, not that a way merely passed by the devise, but a particular way. In giving judgment, ERLE, C. J., said: "We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the court below on the construction and effect of James Pearson's will, taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tene-

ment is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. These are rights which are implied, and we think that the farm devised to the party under whom the defendant claims, could not be enjoyed without dependence on the plaintiff's land, of a right of way over it in the customary manner." This, then, is a distinct decision of the Court of Exchequer Chamber that a way following a particular and defined route, and which is not a way of necessity, may nevertheless pass by implied grant from an owner who has unity of possession both of the close granted and of the adjoining close.

In the case of *Wheeldon* v. *Burrows*, 28 W. R. 196; s. c. 12 Ch. D. 31, the Court of Appeal drew a distinction between the effect of an implied grant and an implied reservation with regard to the much-contested question as to what rights are so reserved to a vendor, and THESIGER, L. J., in the course of his judgment, which was approved by the rest of the court, uses this language: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements)," and this interpretation by means of the term "*quasi*-easements" was needed, because a man can have no easements over his own land, "or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any grant over the tenement granted, it is his duty to reserve it expressly in the grant;" that is to say, he draws a distinction between an implied grant and an implied reservation. The point again came before the Court of Appeal in *Bayley* v. *Great Western Railway*, 26 Ch. D. 434; s. c. 32 W. R. Dig. 227. There the railway company had purchased a piece of land on which was a stable, and the property had been

conveyed to the company, together with "all rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel, or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance. It was held that a right of way passed to the company under the general words in the conveyance, and BOWEN, L. J., in the course of his judgment, said: "This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary." I do not intend to rest my decision in this case on that *dictum*, the way here not being, in my opinion, a way of necessity. But there is another case before the Court of Appeal, *Ford* v. *Metropolitan Railway Co.*, 34 W. R. 426; s. c. 17 Q. B. D. 12, where a house was divided into two blocks, and part of the back block had been demised without any express grant of access thereto. Access was gained through a hall from the street. The railway company, in the exercise of their compulsory powers, removed the hall, and by thus injuring the access to the lessees' rooms lessened their value. It was held that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that the company's interference with this *quasi*-easement was sufficient to give rise to a valid claim for compensation. And this decision did not rest upon the use of any extraordinary words in the lease, such as "used or enjoyed therewith," but was based on this, that the court, looking at the whole of the surrounding facts, and finding a formed way to the rooms existing over the property, held that this constituted a right of access, although there were no special words in the lease referring to it, or any general words which would carry such a right. And it is doubtful whether general words could have any such effect. In *Thomson* v. *Waterlow*, 16 W. R. 686; s. c. L. R. 6 Eq. 36, Lord ROMILLY said that he did not think such words would constitute a grant of a right of way

that had not previously existed as a right. This *dictum* was commented on by Lord BLACKBURN in *Kay* v. *Oxley*, L. R. 10 Q. B. 360, where he says:—"I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right." I leave this contest of authority as I find it, but it is clearly law that a right of passage over a particular formed way like this is, leading to gates in a wall, part of the demised premises, and without which those gates would be perfectly useless, may pass by implied grant, although in some sense not a continuous and apparent easement, or rather because, being a formed road, it is considered in contemplation of the authorities as so passing in the absence of any general words at all. These gardens, although not absolutely inaccessible, could only be reached through the houses themselves, unless through the gates. That a right of way through these gates was intended to pass by the assignment, and that the owners of Cottisbrook and Westbourne were intended to have the use of this back way is, looking at the facts, beyond all doubt. Then, this not being for all purposes a way of necessity, do I want an express grant? It seems to me that the authorities are clear that an express grant is not needed. I hold, therefore, that the right to use this back way in the same way in which it was used at the date of the deed did pass by implied grant under the indenture of the 14th of December, 1878, and I so decide. The plaintiff seeks a declaration that the defendant is not entitled to use this way to Augusta-road. This I cannot grant. On the contrary, I hold that he is entitled to use the way, and I make a declaration accordingly. The plaintiff must pay the costs of the action.

Action dismissed.

The American law on the subject of easements by implied grant, presents four different classes of cases, and it may not be easy to reconcile all the decisions on the subject: See *Dillman* v. *Hoffman*, 38 Wisc. 573 (1875).

I. The first class is where the grant is of some estate described in general language, and not by any specific metes and bounds; such as a conveyance of "a mill," a "dwelling house," etc. In such cases all the parts, and parcels of the mill, house, etc., pass as *parts of the description*, although they may extend over, under or across the remaining land of the grantor. They are not exactly "easements"

over the other premises of the grantor, since he owned the fee in both premises, and no man can have an easement in his own land. They are not exactly "appurtenances," in a proper legal sense of that word, but rather part or parcel of the thing conveyed; an extension, branch or arm thereof, reaching out into the other land of the grantor; and they would equally pass, therefore, whether there were or were not any such words used in the deed, as "with all easements or privileges and appurtenances attached thereto." See *Philbrick* v. *Ewing*, 97 Mass. 133 (1867), a water pipe leading to the house conveyed; *McPherson* v. *Acker*, MacArth. & Mack. 150; s. c. 48 Am. Rep. 749 (1879). And see *Francis* v. *Hayward*, 48 Law T. R. 297 (1882). It was on this ground held in *Culverwell* v. *Lockington*, 24 Upp. Can. C. P. 611, that a demise of a house and premises, might include a right to use a stove pipe running into and through adjoining premises.

In other words, the grant of a principal thing carries with it all that is necessary to the beneficial enjoyment of the thing granted, *which it is in the power of the grantor to convey by more apt and specific words*. Therefore, if a party builds a mill on his own land and cuts an artificial channel or waste way through his other land, to carry off the water from the mill, and then sells the "mill," without including the land through which the race way runs, nor mentioning the race way specifically, the right to use it passes with the mill as a privilege *de facto* annexed thereto, and necessary to its beneficial use: *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190 (1825). And see a very elaborate examination of the authorities upon this point in *Dunklee* v. *Wilton R. R. Co.*, 24 N. H. 439 (1852), in which some of the earlier cases in Massachusetts, Connecticut and New York are doubted. And this rule was adopted in *Young* v. *Wilson*, 21 Grant Ch. 144 (1874) in a carefully considered case.

In *Blaine's Lessee* v. *Chambers*, 1 S. & R. 174 (1814), it was declared, that, by the devise of a "grist mill with the appurtenances," everything would pass which was necessary for the full and free enjoyment of the mill, such as the dam, water, race way, a proper portion of ground around the mill for loading and unloading, etc., as in fact used by the testator in his lifetime. And this was affirmed in *Pickering* v. *Stapler*, 5 S. & R. 107 (1819). See also *Strickler* v. *Todd*, 10 S. & R. 70 (1823); *Le Roy* v. *Platt*, 4 Paige, 77 (1833); *Morgan* v. *Mason*, 20 Ohio, 401 (1851); *Elliott* v. *Sallee*, 14 Ohio St. 10 (1862); *Simmons* v. *Cloonan*, 81 N. Y. 557 (1880). The law is well stated and the authorities collated in the late case of *Jackson* v. *Trullinger*, 9 Oreg. 394 (1881).

So a grant of a "mill site," carries not only the soil under the mill, but also so much land, if owned by the grantor, as is necessary for a mill pond, and for carrying on the mill business: *Whitney* v. *Olney*, 3 Mason, 280 (1823); *Blake* v. *Clark*, 6 Greenl. 436 (1830); *Jackson* v. *Vermilyea*, 6 Cow. 677 (1827); *Maddox* v. *Goddard*, 15 Me. 218 (1839); *Forbush* v. *Lombard*, 13 Met. 114 (1847). Though not neccessarily *all* the land adjoining, which the grantor had in fact used with his mill: *Plimpton* v. *Converse*, 42 Vt. 712 (1870). It is a question of practical necessity in each case: *Voorhees* v. *Burchard*, 55 N. Y. (1873). Possibly a deed of a mill site, by specific *metes and bounds*, and containing no allusion to the use of a reservoir above, owned by the grantor, might not pass any such right though the mill stream were small and the use of the reservoir highly essential

for the mill: *Brace* v. *Yale*, 4 Allen, 393 (1862).

In *Oakley* v. *Stanley*, 5 Wend. 524 (1830), it was held, that a conveyance of a mill *and dam*, which at the time flowed other land of the grantor, carried a right to continue such flowage to the same height, the main value of the premises conveyed consisting in the mill privilege, which would be destroyed by cutting down the dam. It is partly on this ground, that the *outside* wall of a leased store or building passes to the lessee, as well as the inside, and therefore the lessor could not subsequently let the outside wall to other parties, for signs, bill posters, etc., or use it himself: *Riddle* v. *Littlefield*, 53 N. H. 503 (1873); *Baldwin* v. *Morgan*, 43 Hun, 355 (1887); *Lowell* v. *Strahan*, S. Jud. Ct. Mass., June 30, 1887.

II. The second class of cases, is where the estate granted, is definitely and specifically described by metes and bounds, and not by some broad, general description, as before stated; but in which the *quasi*-easement, privilege or use of the remaining land of the grantor, is actually necessary for the proper use and enjoyment of the estate specifically described in the deed. Here all agree that the way, drain or other easement, which was actually used by the grantor, when he owned both estates, over or through the one retained, does pass to the grantee of the estate for which such way, drain, etc., was originally constructed or used by the grantor. The case of *Thayer* v. *Payne*, 2 Cush. 327 (1848), furnishes a good illustration of this rule. There the owner of two adjoining lots, from one of which an underground drain existed through the other to a convenient outlet, sold the upper lot, without any specific mention of the drain, retaining the lower lot through which the drain was laid. The drain being out of repair, the grantee of the upper lot entered upon the lower lot of the grantor to repair the drain, for which he was sued in trespass by the grantor, and it was held that the right to use the drain passed with the grant, if it was necessary for the beneficial enjoyment of the house and land granted; that is, whether another drain could be conveniently made from the granted premises with reasonable labor and expense without going through the grantor's remaining land. And see *Leonard* v. *Leonard*, 7 Allen, 283 (1863). *Kelly* v. *Dunning*, 43 N. J. Eq. 62, is much like *Thayer* v. *Payne*, and the excellent opinion of VAN FLEET, V. C., is well worthy of perusal. *Hair* v. *Downing*, S. Ct. N. C., May 21, 1887, is similar.

In *Brakely* v. *Sharp*, 9 N. J. Eq. 10, and 10 Id. 206 (1854), C. S. died, leaving a farm, through which there was an artificial water-course. Part of the farm through which the artificial water-course extended, was set off to the heirs by proceedings in the Orphans' Court. The other part was sold under an order of court, and it was held, that the purchaser of the last tract became entitled to a continued use of the water-course as it existed at the time of sale, it being proved that it could not "be beneficially enjoyed without the use of the aqueduct."

So, in *Coolidge* v. *Hager*, 43 Vt. 9 (1870), it was held, that a grant of a dwelling-house and lot by a warranty deed, with the privileges and appurtenances, conveys a right to an aqueduct then running to the land granted from a spring on other land of the grantor, as an appurtenance to the estate granted. The same had been previously held in *The Vermont Cent. R. R. Co.* v. *Hills*, 23 Vt. 681 (1851), in which the contrary case of *Manning* v.

Smith, 6 Conn. 289, was much doubted. See also, *De Lure* v. *Bradbury*, 25 N. J. Eq. 70 (1874); *Central Railroad Co.* v. *Valentine*, 29 N. J. L. 561 (1862).

These cases rest upon the ground of a "reasonable necessity" for the continual use of the old drain or aqueduct by the new proprietor; and therefore if the latter could build an equally beneficial drain or way, etc., to his own land, with reasonable labor and expense, he does not by such grant acquire a right to continue to use the old one. See *Johnson* v. *Jordan*, 2 Met. 234 (1841); *Randall* v. *McLaughlin*, 10 Allen, 366 (1865); *Dolliff* v. *Boston & Maine R. R.*, 68 Me. 173 (1878). Some of the cases may require more, and some less of a necessity, in order to imply a grant, but whatever shades of difference there may be in the cases, it may be safely said, that when the *quasi* easement is apparent, continuous and practically necessary, it passes by implication, although the deed is silent upon the subject. See the late case of *Sanderlin* v. *Baxter*, 76 Va. 299 (1882).

III. The third class of cases, is where the *quasi* easement claimed by the grantee, is not so reasonably "necessary" for the use and enjoyment of the estate granted as in the last class, but is only highly *convenient and beneficial* thereto. Here also there is some difference of opinion; some holding that if the *quasi* easement is apparent and continuous, it passes with the grant, though not necessary; while many require that the alleged easement must have been necessary to the estate granted. In support of the first view, perhaps *Lampman* v. *Milks*, 21 N. Y. 505 (1860), is the leading case in America. There A. owned a tract of land, containing about forty acres, through a corner of which a small brook naturally flowed, but he diverted the brook from its natural course into a different direction through his said tract. Ten years after such diversion he sold the corner lot, through which the brook formerly flowed, to L., who built a house upon it. Subsequently A. sold the balance of the forty-acre tract to M. with the water running in the new artificial channel. Four years afterwards M. dammed up this artificial channel and caused the water to flow back in its former course and it overflowed L.'s house-lot. It was held that L. by his purchase of A. with the water then flowing over A.'s remaining land, to the benefit of the corner lot, acquired a right to have it so continue to flow and that neither A. nor his second grantee M. could return the water to its original course, to the injury of A.'s house-lot. *Cave* v. *Crafts*, 53 Cal. 135 (1878), is much like it. But *Lampman* v. *Milks* has often been thought an extreme case, and sometimes wholly repudiated: and in New York even, the tendency is not to extend it.

It had previously been held, more obviously by the same court, in *Huttemeier* v. *Albro*, 18 N. Y. 48; s. c. 2 Bosw. 546 (1858), that, when several persons owned three lots in New York city, fronting on a public street, and abutting on an alley way in the rear, leading out to a side street, which had been used for many years as a means of access to the rear of said lots, and the owners made partition among themselves, of three lots *which referred to the alley as a boundary*, but did not include the land thereof within the stated metes and bounds, each owner continued to have a right of way over such alley to his own premises, the same being then open, apparent to observation, and in actual use by the owners for more than forty years. This is much like the principal case. *Kieffer* v. *Imhoff*, 26 Penn. St. 438

(1856), is much like it. So is *Cihak* v. *Klekr*, 117 Ill. 643 (1886).

The question, whether a way over other land is so "continuous and apparent" as to fall within the rule that it will pass, seems to be a question of fact in each case. It may be so well worn, and so expensively constructed, and so constantly used, that the buyer of the adjoining land might well be supposed to contract with reference to it, and the owner of the land over which it extends might well be apprised that he was taking the estate subject to that burden. If so, it seems to rest on the same ground as water pipes, mill races, etc. See *Phillips* v. *Phillips*, 48 Penn. St. 186 (1864); *Kieffer* v. *Imhoff*, *supra*; *McCarty* v. *Kitchenman*, 47 Penn. St. 239 (1864); *Pennsylvania P. R. Co.* v. *Jones*, 50 Id. 417 (1865); *Overdeer* v. *Updegraff*, 69 Id. 119 (1871); *Cannon* v. *Boyd*, 73 Id. 179 (1873); *Thompson* v. *Miner*, 30 Iowa, 386 (1870). This view was elaborately maintained in *Harris* v. *Smith*, 40 Upp. Can. Q. B. 33 (1876), where the authorities are fully examined. And see *Goodall* v. *Godfrey*, 53 Vt. 219 (1880); *Worne v. Marsh*, 6 Phila. 33 (1865); *The Church* v. *Vonneida*, 6 Id. 557 (1868); *Building Association* v. *Getty*, 11 Id. 305 (1876); *Robinson* v. *Thrailkill*, 110 Ind. 117; *Dillman* v. *Hoffman*, 38 Wisc. 559 (1875); *Jarstadt* v. *Smith*, 51 Id. 96 (1881); *Galloway* v. *Bonested*, 65 Id. 79 (1886), in which many authorities are cited.

In *Havens* v. *Klein*, 51 How. Pr. R. 82 (1875), A. owned two adjoining lots, one with a building on it, the windows of which overlooked the other, and the window shutters when open, swung out over it, and fire escapes also led from the building down into the vacant lot. He sold the lot and building, retaining the other, which he subsequently sold to a third person, no mention being made in any of the deeds, of any easements or incumbrances. *Held*, that the buyer of the lot and building acquired a right over the vacant lot for his shutters and fire escapes, as used at the time of the purchase. This is much like the case of *United States* v. *Appleton*, 1 Sumn. 492 (1813), a leading case on this particular phase of the subject.

The importance of the visibility and knowledge of an existing privilege or benefit over other land, in order to pass it, unless it is strictly a matter of necessity, is also well illustrated by *Tabor* v. *Bradley*, 18 N. Y. 109 (1858). There W. had erected a mill and mill dam on land of H. which flowed back on H.'s land. H. conveyed to W. the land where his mill was situated, by *defined metes and bounds*, but without mentioning the mill, dam, or water privilege in any way, and H. did not then know his remaining land was flooded by W.'s mill pond. *Held*, that the deed did not convey any right to W. to continue to flow the land of H.

On the other hand, if the alleged easement is not continuous and apparent, and is not strictly necessary to the estate granted, it is held in many cases, not to pass. And ordinary ways over other land of the grantor have often been thought to be within this class. See the carefully considered case of *Outerbridge* v. *Phelps*, 13 Abb. N. C. 117 (1883). And see *In re Francie's Appeal*, 96 Penn. St. 200 (1880); *Adams's Appeal*, 7 W. N. C. (1879), S. Ct. Penna., March 3, 1879.

So in *Fetters* v. *Humphreys*, 18 N. J. Eq. 260 (1867). A. owned a dwelling-house and stable, used in connection with the house, and he had constructed and used a way from the barn to the street, over other land of his. He devised to his wife "the house

and lot occupied by me." The barn could be reached from the street by constructing a new way through a flower garden on the premises. The other land over which the way to barn was constructed, he devised to other parties. It was held that his widow did not take, under that devise, any right of way over the land devised to others; that it was not a way of necessity, nor an "apparent and continuous" easement, that it had no legal existence as a right of way at his death, and that the words of the devise were not sufficient to include it. This was affirmed in 19 N. J. Eq. 471 (1868) and the authorities examined. See also *Oliver* v. *Hook*, 47 Md. 301 (1877); *Standiford* v. *Goudy*, 6 W. Va. 364 (1873).

In *Stuyvesant* v. *Woodruff*, 21 N. J. Law, 133 (1847), a case elaborately argued, S. owned two adjoining lots, both bounding on a highway, and he had been accustomed to pass from one, on which was his mansion, over the other, to and from the road. After his death, the plaintiff bought the dwelling-house and lot, "with the appurtenances," and sometime afterwards the defendant acquired the premises over which S. had passed and repassed, and closed up the way. *Held*, that the plaintiff by his deed acquired no right of way over the other land.

In *Grant* v. *Chase*, 17 Mass. 443 (1821), it was held, that a conveyance of a specific tract, described by meets and bounds, but carved out of a large tract owned by the grantor, did not carry a right of way or other easement in or over the remaining land of the grantor, which was a matter of convenience, and importance even to the land granted, but not really "necessary" thereto. In this case, there was a well and outhouse on the land retained by the grantor, which had been used before the conveyance by the occupants of both estates. And the deed of the other tract was, "with all the privileges and appurtenances thereto belonging," but it was held the grantee had no right to use the well and outhouse after such conveyance. See also *O'Rorke* v. *Smith*, 11 R. I. 259.

In *Denton* v. *Leddell*, 23 N. J. Eq. 67 (1872), the rule was stated to be, "that if the owner of a tract of land, of which one part has had the benefit of a drain, water-pipe, or watercourse, or other artificial advantage in the nature of an easement through or in the other part, sells or devises either part, an easement is created by implication in or to the other part. And this is the case when the servient part is the one sold or devised. *But this is confined to continuous and apparent easements.*" So in *Parsons* v. *Johnson*, 68 N. Y. 62 (1877).

That nothing passes by the word "appurtenances" except such incorporeal easements, or rights, or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted; and that a mere convenience is not sufficient to thus create such a right or easement, was again asserted by the Court of Appeals in New York, in the very late case of *Root* v. *Wadhams*, Ct. App. N. Y., November 29, 1887. And see *Griffiths* v. *Morrison*, 106 N. Y. 165 (1887).

IV. The fourth class of cases is where the *grantor* claims a right or easement over the *estate granted*, by an "implied reservation," as it is called, the deed being silent upon the subject. And here the prevailing rule in America (contrary to *Pyer* v. *Carter*, 1 H. & N. 916), that although the alleged easement over the granted land be both "continuous and apparent," yet if it be not actually *necessary* for the estate retained by the grantor, the latter does not retain any right to

such easement, by implied reservation from his own grant.

Carbrey v. *Willis*, 7 Allen, 364 (1863), is an important case on this point, in which it was held that if the owner of two adjoining estates, through one of which an underground drain exists in favor of the other, conveys the one containing the drain, with full covenants of warranty, retaining the other, he does not by implication retain any right to use the drain for the estate retained, unless it was necessary to the enjoyment thereof, was annexed *de facto* to the estate so retained, and was in actual use at the time of the grant. And no "necessity" can be deemed to exist, if a similar privilege can be secured by reasonable trouble and expense. This is undoubtedly the law of Massachusetts. See *Randall* v. *McLaughlin*, 10 Allen, 366 (1865); *Parker* v. *Bennett*, 11 Id. 319 (1865); *Buss* v. *Dyer*, 125 Mass. 291 (1878). *Scott* v. *Beutel*, 23 Gratt. 1 (1873) is much like *Carbrey* v. *Willis*, 7 Allen, 364. And see *Hardy* v. *McCullough*, 23 Gratt. 259 (1873); *Shoemaker* v. *Shoemaker*, 11 Abb. N. C. 80 (1882). And the same has recently been held in Maine: *Warren* v. *Blake*, 54 Me. 276 (1866), a valuable case approving *Carbrey* v. *Willis*.

So in *Burr* v. *Mills*, 21 Wend. 290 (1839), it was held, that if an owner of land with a mill and mill-pond upon it, conveys away that portion which is flowed by the pond, retaining the mill, he does not retain by implication any right to continue to flow the portion so sold. "He might as well," said the court, "claim to plow and crop the land sold." *Preble* v. *Reed*, 17 Me. 175, is much like it.

In *Butterworth* v. *Crawford*, 46 N. Y. 353 (1871), A. owned two lots 83 and 85 on a street in New York city, with a privy vault under the dividing line between them, which was used by both estates. He conveyed to C. lot 85, through which an underground drain extended from said vault to the public sewer, not expressly reserving any right to the drain. He subsequently sold lot 83 to B. Subsequently C. in building on his own land cut off the drain, for which B. sued him. *Held*, that when A. sold the first lot to C. without mentioning the drain, he did not impliedly retain a right to continue the drain, and did not give any such right to B. And see *Schrymsen* v. *Phelps*, 62 How. Pr. R. 1 (1881).

On the other hand in *Seibert* v. *Levan*, 8 Penn. St. 383 (1848), quite contrary to *Burr* v. *Mills*, 21 Wend. 292, it was distinctly decided, that if A. owning two tracts, builds a mill with a dam and race way to supply the same, and afterwards sells the land containing the dam and race way, but retaining the mill, by deed with no express reservation of the dam, or artificial race way, he still retains the right to use the same; and the grantee is liable for obstructing or diverting the water. Two judges dissented.

Still stronger in the same line is *Seymour* v. *Lewis*, 13 N. J. Eq. 439 (1861) in which the owner of a paper mill had by an artificial channel, conveyed the water thereto from a spring lot, and sold the latter, retaining the mill; it was held, that the purchaser of the spring lot took it subject to the burden of the privilege, and had no right to interfere with the continued use of the water by the grantor for his mill.

This was undoubtedly the French law, *destenation du père de famille*, as explained by Pardessus, *Traite des Servitudes*, § 288; but such apparently is not the common law of England, or of America.

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